

(2004) 10 AHC CK 0001

In the Allahabad High Court

Case No : IT Ref. No. 10 of 1986 & IT Reference No. 10 of 1986 29 October 2004

P.N. Shukla

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 29-10-2004

Acts Referred:

Income Tax Act, 1961 — Section 23, 256, 56

Citation : (2005) 142 TAXMAN 624

Hon'ble Judges : R.K. Agrawal, J;Prakash Krishna, J

Bench : Full Bench

Advocate : Vikram Gulati, for the Assessee A.N. Mahajan, for the Revenue, for the Appellant;

Judgement

R.K. Agrawal, J.

The Income Tax Appellate Tribunal, Allahabad has referred the following question of law u/s 256(1) of the Income Tax Act, 1961, hereinafter referred to as the Act, for opinion to this court:

"Whether on facts and in the circumstances of the case, the assessee is entitled to the relief under proviso (c) to section 23(1) of Income Tax Act, 1961."

2. Briefly stated the facts giving rise to the present reference are as follows :

The present reference relates to the assessment year 1979-80 of which the relevant previous year ends on 31-3-1979. The applicant is an individual. He derives income from salary and property. He owns a property situated at B40, Nirala Nagar, Lucknow. The ground floor of the property was let out on 1-8-1978 to the Fertilizer Corporation of India Ltd. on a monthly rent of Rs. 4,500 out of which Rs. 1,250 was payable towards the installation of booster pump and other fixtures. The applicant claimed deduction under clause (c) of the second proviso to section 23(1) of the Act. He claimed the total deduction of Rs. 6,400 on the ground that there were four units in the said property. The Income Tax Officer, however, disallowed the deduction/relief u/s 23(1) of the Act on the ground that

the property has been let out for the non-residential purpose. Feeling aggrieved, the applicant preferred an appeal before the Appellate Assistant CIT, Kanpur, who had allowed a deduction of Rs. 2,400 only instead of Rs. 6,400 as claimed by the applicant. Feeling aggrieved by the said order, the revenue preferred an appeal before the Income Tax Appellate Tribunal. The Tribunal has reversed the order passed by the Appellate Assistant CIT on this issue. According to the Tribunal relief under clause (c) of the second proviso to section 23(1) of the Act is admissible to the residential unit only which has to be judged from the use to which the property has been put and since the property in question has been put for non-residential use, he is not entitled to relief under clause (c) of the second proviso to section 23(1) of the Act.

3. We have heard Sri Vikram Gulati, learned counsel for the applicant and Sri A.N. Mahajan, learned standing counsel for the revenue.

4. Learned counsel for the applicant submitted that the applicant had constructed a residential unit and therefore, is entitled for relief under clause (c) of the second proviso to section 23(1) of the Act. He relied upon a decision of the Kerala High Court in the case of Dr. P.A. Varghese Vs. Commissioner of Income Tax,

5. Sri A.N. Mahajan, learned counsel appearing for the revenue submitted that deduction under clause (c) of the second proviso to section 23(1) of the Act is available only to the residential unit and if the unit has been put to use for the non-residential purpose no relief can be granted.

6. Having heard learned counsel for the parties we find that it is not in dispute that the property in question has been let out to the Fertilizer Corporation of India Ltd. for non-residential use, i.e., for commercial purpose. In the order passed by the Appellant Assistant Commissioner a categorical finding has been recorded that the property has been let out for non-residential purpose. The aforesaid finding has not been challenged by the applicant. The relief under clause (c) of the second proviso to section 23(1) of the Act is available to a building comprising one or more residential units which have been completed before the stipulated date. Clause (c) of the second proviso to section 23(1) of the Act reads as follows:

"Provided further that the annual value as determined under this subsection shall,

(c) in the case of a building comprising one or more residential units, the erection of which is completed after the 31-3-1978, but before the 1-4-1982, for a period of five years from the date of completion of the building, be reduced by a sum equal to the aggregate of

(i) in respect of any residential unit whose annual value as so determined does not exceed two thousand four hundred rupees, the amount of such annual value;

(ii) in respect of any residential unit whose annual value as so determined exceeds two thousand four hundred rupees, an amount of two thousand four

hundred rupees;"

From a reading of the aforesaid clause it will be seen that for claiming the relief under the aforesaid provisions the building should be (i) a residential one, it may comprise of one or more residential units; (ii) its erection should be completed after 31-3-1978 but before 1-4-1982; (iii) the deduction while computing the annual value is available for a period of five years from the date of completion of the building and (iv) the amount of deduction is Rs. 2,400 in respect of any residential units whose annual value so determined exceeds Rs. 2,400.

7. If the conditions mentioned in items (i) to (iii) above are fulfilled, only then the relief under clause (c) of the second proviso to section 23(1) of the Act is available otherwise not.

8. In the case of Dr. P.A. Varghese (supra) the Kerala High Court has held that where the assessee agreed to let out the second floor of a building for a rent of Rs. 2,350 per mensem agreeing to provide for partition, necessary lavatories, closets, etc. air-conditioning for one room, one fluorescent tube fitting, separate electric meters, uninterrupted water supply and electric lift, the letting was not of machinery, plant or furniture but only the letting of a building with certain amenities and, therefore, provisions of section 56(2)(iii) of the Act was not applicable and the income from the letting out was chargeable as "income from house property" and not as "income from other sources". The aforesaid decision is of no help to the applicant, inasmuch as the question whether the amount of Rs. 1,250 per month which the applicant is receiving towards installation of booster pump and other fixtures is to be chargeable under the head "income from house property" or "income from other sources" is not involved in the present reference. Whereas in the present reference we are only concerned as to whether relief under clause (c) of the second proviso to section 23(1) of the Act can be claimed by the applicant in respect of the property in question.

9. In the case of Commissioner of Income Tax Vs. Mrs. Elizabeth Varghese, the Kerala High Court has held that the expression "building comprising one or more residential units occurring in clause (b) of section 23(1) of the Act has to be understood as signifying composite structures containing a plurality of residential or dwelling units, such as flats. The mere fact that a building has several rooms with attached bathroom facility will not render it a "building comprising as many residential units as there are such rooms". Clauses (a) and (b) of the proviso to clause (b) of section 23(1) will take within their ambit only buildings comprising a plurality of dwelling units like flats, which by themselves will constitute houses or homes. Each such dwelling units will ordinarily be a separate house in itself with its own electric meter or water supply connection. Sub-clauses (i) and (ii) of clause (b) of the proviso to section 23(1)(b) also indicates that in order to constitute a residential unit for the purposes of the section, it must have a separate annual value.

10. In the case of S.C. Majumdar Vs. Commissioner of Income Tax, the Calcutta

High Court has held that the proviso to section 23(1) of the Act uses the expressions "building" and "residential units". These are not defined in the Act and have to be given their ordinary meaning. The building should certainly be one habitable and complete and it may be either one storeyed or have more than one storey. Hence on reading clause (b) of the second proviso to section 23(1) of the Act, it seems that if the construction of a building is started after 1-4-1961 and is completed after 31-3-1970, the assessee would be entitled to the deduction in respect of the building as mentioned in clause (b)(i) of the second proviso to section 23(1) of the Act.

11. In the case of J.V. Desai Vs. Commissioner of Income Tax, the Andhra Pradesh High Court has held that the benefit envisaged under clause (c) of the second proviso to section 23(1) of the Act is to a building comprising one or more residential units constructed during the period specified therein and is riot dependent upon its user by the tenant to whom the building was subsequently let out. There are no express words employed in the second proviso to section 23(1) of the Act restricting grant of relief envisaged therein with reference to the subsequent user of the building. In a fiscal enactment, nothing is to be read in and nothing is to be implied. It has further held that since both the units were residential when let out, the assessee was entitled to a deduction of Rs. 1,200 from out of the annual rent received from each unit of the building in the computation of his income irrespective of its user by the tenant.

12. In the case of C.H. Kesava Rao Vs. Commissioner of Income Tax, the Madras High Court has held that the object of the second proviso to section 23(1) of the Act is to allow a reduction of Rs. 600 per annum from the annual value of new residential units completed after 31-3-1961. Normally each room in a lodge cannot be taken to be a residential unit. It has further held that the building had been assessed by the Municipal Corporation as a single unit and there was no separate annual value for each room and hence the question of application of second proviso to section 23(1) of the Act treating each of the rooms in the building as a separate residential unit would not arise. The assessee was not entitled to the deduction claimed.

13. In the case of Commissioner of Income Tax Vs. Smt. Shyama Devi Dalmia, the Calcutta High Court has held that from the legislative history, it will be evident that the object of allowing this concession was to encourage the construction of residential houses. Even if a house is constructed as a residential unit, but used for commercial purposes, it can no longer be said to be a residential unit. The purpose for which the tenant uses the flat or the house is important in deciding this issue. It is true that the second proviso to section 23(1) of the Act refers to residential units and it does not refer to the purpose for which the occupant actually uses it. But some meaning has to be assigned to the expression "residential units". It has been further of the view that the benefit conferred by clause (b) of the second proviso to section 23(1) of the Act could only be availed of if the building was actually used for residential purposes and

not otherwise. The nature of the user of the building let out determines the grant or denial of relief envisaged by clause (b) of the second proviso to section 23(1) of the Act. Had the object of the Legislature been to allow this concession irrespective of the user of the building, it was not necessary to qualify the word "unit" by the expression "residential". An owner may construct a building with self-contained floors with the object of letting out the same to tenants, but such letting out has to be for the purpose of residence of the tenants and not otherwise. Admittedly, in this case, the units, which were let out to the bank, were not constructed as residential units. A residential unit is that which is used as a residence. A distinction has been made between a residential unit in the occupation of the owner for the purpose of his own residence and a residential unit let out to tenants. Where the residential unit referred to in the second proviso to section 23(1) of the Act is in the occupation of the owner for the purposes of his own residence, he does not get the concession as provided therein. Where, however, a residential unit is not in the occupation of the owner but has been let out to tenants for the purpose of their residence, the concession as admissible under the second proviso to section 23(1) will be available to the owner of the residential unit. The expression "residential unit", in the context in which it is used, necessarily denotes a dwelling unit for residence.

14. In the case of Commissioner of Income Tax Delhi-IV Vs. Purshottam Dass, the Delhi High Court has distinguished the decision of Smt. Shyama Devi Dalmia's case (supra) on the ground that in the aforesaid case admittedly the units which were let out to the bank were not constructed as residential units whereas the factual position is different in the case in hand where the clinching materials go to show to us that the construction was made for residential purpose and in a residential area. There was temporary non-user as residence and consequent temporary user for office purposes.

15. We are in full agreement with the principle laid down by the Calcutta High Court in the case of Smt. Shyama Devi Dalmia (supra). Applying the principle laid down in the aforesaid case to the facts of the present case, we find that from the very beginning the property has been let out to the Fertilizer Corporation of India Ltd. for non residential use. Even when the construction of the ground floor of the building was made it was let out of the Fertilizer Corporation of India Ltd. Thus, the intention of the applicant from the very beginning was to construct the building for nonresidential purpose. In order to claim benefit of deduction under clause (c) of the second proviso to section 23(1) of the Act from the annual value the unit should be a residential unit.

16. In view of the foregoing discussions, the applicant was not entitled for deduction under clause (c) of the second proviso to section 23(1) of the Act. Accordingly, we answer the question of law referred to us in the negative ie., in favour of the revenue and against the assessee. However, there shall be no order as to costs.